No. 5736

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARVID PEARSON and A. J. HENNESSY,
Appellants,

vs.

A. W. HIGGINS, as Trustee in Bankruptcy of Louis Morgan (a Bankrupt),
Appellee.

APPELLANTS' PETITION FOR A REHEARING.

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To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit and to the Court:

I.

The appeal in this case was dismissed by you four days ago, to wit: on the 15th day of July, 1929, and solely upon a ground clearly and directly contradicted by and in conflict with the record, viz.: *that the referee in bankruptcy made no "turn-over" order.* The record certainly shows HE DID, and that the order as therein stated, is as follows:

"The REFEREE: In the making of this order overruling the plea to the jurisdiction, the referee goes

further and holds that the trustee is entitled to the possession of the boat, and the order is that the boat be delivered to the trustee. Under this order of delivery, however, I will grant you a stay of five days." (Record, p. 21.) At pages 22, 23, 25, 26 and 27 of the record, the petition to the District Court for review of this order, expressly specifies it as the sole and only basis of the petition. At pages 29 and 32 of the record, the *referee* in response to the petition, adverts to this "turn-over" order as having been made by him. At pages 29, 32, 37 and 38 of the record, he expressly states that the above quoted "turn-over" order was made by him; this statement of the referee in response to the petition for review, is required by General Order XXVII in Bankruptcy. In deciding the petition for review of this "turn-over" order of the *referee,* the District Court on briefs and argument directed specifically to the invalidity of the "turn-over" order, denied the petition and confirmed the order by confirming the *referee's* report relating to it. (Record, pp. 17, 21, 29, 31, 32, 37, 38.) Clearly this decree of the District Court is appealable under Section 24a of the Bankruptcy Act as amended May 28, 1926. (44 Stat. 662.) It is distinctly so held in:

Taylor v. Voss, 271 U. S. 180, 181, 183; 46 S. C. Rep. 461, 463, 464, 465;
Harrison v. Chamberlin, 271 U. S. 191, 193;
Gibbons v. Goldsmith, 222 F. 826, 828;
Clark v. Huckaby, 28 F. (2d) 154, 156, 157.

The appellants' briefs explicitly specify repeatedly *the record fact that the "turn-over" order was made by the referee.* See opening brief, pages 1, 3, 4, 8, 14,

16, 17, 22, 23, and reply brief, pages 2, 4, 5, 15, 16, 18, 19, 20 and 21. And so does the brief of the appellee and so do the assignments of error. (Record, pp. 42, 43, 44 and 45.) And so do the specifications of error as set forth at pages 7 and 8 of the opening brief of appellants, and the "turn-over" order is also indicated in the referee's order to show cause as appearing at page 6 of the record, and upon which the "turn-over" order was made. The certified transcript of the record as furnished on the appeal, contains the "turn-over" order of the referee, as per the praecipe. (Record, pp. 1, 2, 21, 29, 32, 37, 38, 48.) The point or ground upon which the appeal has been erroneously dismissed by you, is not only entirely without support in the record and clearly in conflict with the record, but it is a point and ground not raised by counsel for appellee in their brief nor at the oral argument nor by you during the course of the argument, nor in the District Court upon the petition for review, nor at all. This alone should induce reconsideration.

Clearly it would not be right or legal or just to put the appellants to the expense and delay of another appeal to obtain the remedy the law plainly gives them against the existing void "turn-over" order of the referee, when the necessary remedy can and should be had by the present and pending appeal. The record is clear that the proceedings and decree of the District Court on the petition for review, are based on the uncontroverted and unquestioned fact that the referee made the "turn-over" order and the Court below in denying the petition, sustained the order, for the

prayer of the petition is that the order be "vacated, set aside and annulled." (Record, pp. 22, 27.) Not only the appellants contend, but the *appellee* contends that the "turn-over" order was made by the referee precisely as appears at pages 21, 29 and 32 of the record. If it is not a "turn-over" order, the parties have the right on this appeal to an explicit decision on the point, for it is considered by them and by the referee and by the District Court to be such an order. The existence of the order is alleged in the petition, as appears at page 22 of the record, and not traversed by answer. This it is held is conclusive of the fact, by the authorities cited at page 9 of appellants' opening brief. The appeal is properly taken from the order and decree of the District Court, denying the petition for review and confirming the order and proceedings of the referee. (Record, pp. 39, 40.) There is no such thing as an *appeal* from the referee's "turn-over" order, but the appeal as properly taken and perfected, from the decree of confirmation, and denial of the petition, involves the validity of the order.

II.

You erroneously say in your opinion on file in the case, that

> "the referee decided *only* that in a summary proceeding, instituted by the trustee, the bankruptcy court had jurisdiction to entertain the issue. * * * Appellants could have no real grievance unless and until the referee entered a turn-over order."

The *record* at pages 4, 5, 6, 17, 18, 21, 22, 23, 25, 26, 27, 29, 31, 32, 37, 38, shows that the referee not only erroneously decided that in a summary proceeding instituted by the trustee, the Bankruptcy Court had jurisdiction to entertain the issue, but also that on the very basis of this plainly erroneous ruling, the referee made and entered the "turn-over" order requiring appellants to deliver possession of the boat "Saxon" to the trustee, thereby in summary proceedings, taking the boat from appellants and giving it to the trustee without any hearing or decision respecting the legal right of appellants to have and retain possession of the boat as partnership property, and without allegation by the trustee or the slightest evidence that the adverse claim of appellants to the boat is merely colorable and not real, substantial and *bona fide;* it results that the "turn-over" order of the referee is void, it being clearly in violation of the Fifth Amendment of the Constitution of the United States in depriving appellants of their property without due process of law as distinctly held by all the authorities on the very point, some of which we cite:

Marshall v. Knox, 16 Wall. 551, 555, 556, 557;
Smith v. Mason, 14 Wall. 419, 431, 433;
Louisville T. Co. v. Cominger, 184 U. S. 18, 25;
Havemeyer v. Superior Court, 84 Cal. 327, 396, 397, 400, 401;
Stuparich v. Superior Court, 123 Cal. 290, 292.

We of course concede that if the referee had made no "turn-over" order, and had only overruled the plea to the jurisdiction, and did nothing more than that, there would be nothing to support the appeal; but

the record here is clear, direct and conclusive that the "turn-over" order was made by the referee, and on the basis of his plainly erroneous order overruling the appellants' objection to the jurisdiction; your undoubtedly erroneous decision to the contrary, is certainly refuted by the record as it stands before you on this appeal. True the "turn-over" order was not made upon a hearing on the merits as to whether the boat is or is not partnership property, but this could not legally be done by the Bankruptcy Court or its referee, for want of competent jurisdiction to do it, as held by the many authorities cited at pages 13 and 14 of appellants' opening brief; and in any event it can make no difference that the "turn-over" order was not made upon a hearing on the merits, for it is the legal and constitutional right of the appellants to defend and retain their possession of the boat under the adverse claim of title they assert to it as being partnership property and against the manifestly void "turn-over" order of the referee, requiring them in summary proceedings to at once surrender and deliver the boat to the trustee and *thereafter* litigate their right to its possession, thus illegally and in violation of their constitutional right, first dispossessing them of their property without "due process of law," and then compelling them to go to Court to recover it. Were they to comply with the existing void order of the referee and deliver the boat to the trustee, as required by it, there could be no such thing as a subsequent "turn-over" order in a *trial* that if held, would be necessarily void for want of jurisdiction, if had on the merits of the issue as to whether the boat is

partnership property or not, for the trustee would have the possession. This answers your suggestion about appellants having appealed "without awaiting the event of a trial on the merits," and that "after a hearing on the merits, the trustee's prayer may be denied, in which contingency appellants will have no ground to complain." They certainly have ground to complain against a *trial* that if had would undoubtedly be void *for want of jurisdiction,* as held by the authorities cited at pages 13 and 14 of the opening brief. Therefore this present opportunity by means of the pending appeal is the only one appellants can have to contest the validity of the "turn-over" order as heretofore made by the referee upon the petition of the trustee and on the incidental order to show cause, appearing in the record at pages 2 to 6, inclusive. Appellants' right to make the contest on the appeal, results from the decree of the District Court confirming the referee's void "turn-over" order, and denying the petition to vacate and adjudge it void, (Record, pp. 22 to 27, 39, 40), upon a review pursuant to General Order XXVII of the General Orders in Bankruptcy and Rule 9 of the Rules of the District Court respecting proceedings in bankruptcy. That the decree of the District Court is appealable under Section 24a of the Bankruptcy Act as amended May 28, 1926, (44 Stat. 662), is distinctly held to be the law, by the authorities herein cited on the point.

III.

You say in the opinion on file that "after a hearing upon the merits, the trustee's prayer may be denied, in which contingency appellants will have no ground to complain." The obvious and conclusive answer to this suggestion is that in the first place and as held by the many authorities cited at pages 13 and 14 of the opening brief, and upon the facts shown by the record, the Bankruptcy Court and its referee have no jurisdiction to hold a hearing on the merits of the adverse claim, and in the next place and in the meantime, the appellants are deprived by the referee's void "turn-over" order, of the possession of their property, taken from them without due process of law and in violation of the Fifth Amendment, it being the fact established by the record that the referee made the "turn-over" order, without allegation, proof or decision or hearing tending in the slightest degree to show that appellants' adverse claim to the boat is merely colorable and not real, substantial and *bona fide*,—a conclusive and jurisdictional point against the validity of the order, as held by the authorities cited in the opening brief; and it being also clear from the case as presented by the record, that neither the Bankruptcy Court, its referee or the trustee ever had the requisite jurisdictional possession, actual or constructive, of the boat as the necessary competent and valid basis and essential condition precedent to the existence of a right in the Court or its referee to determine *on its merits* the issue either in plenary suit or summary proceedings, to wit: the issue whether the adverse

claim of appellants to the boat as partnership property is sustained by the law and the facts, or merely colorable, and it being also clearly established by the record that the boat is in a perfectly valid *custodia legis* of the state Court and it being the well settled law as shown by the many authorities cited at pages 13 and 14 of the opening brief, that the jurisdiction to determine the case and the issue on its merits, is *exclusively* in the state Court, in the plenary suit there pending. All these plainly conclusive points amply sustained by the many authorities cited in appellants' briefs, pertain to the merits of the appeal now pending before you, and on principle and authority, as fully shown in the briefs, they are certainly entitled to have them determined on this appeal and on the record as it stands, your fundamental mistake being in assuming *contrary to and in conflict with the record,* that there was no "turn-over" order made by the referee, when the record shows clearly that the order was made. (Record, pp. 21, 29, 32.)

IV.

There is yet another aspect of the case, conclusively showing that your decision is contrary to well settled law, for in the reasoning upon which your ruling is based, you virtually and erroneously hold that the District Court in bankruptcy and its referee have competent jurisdiction to determine the issue *on its merits,* whether the boat in controversy is or is not partnership property, when according to the many au-

thorities cited at pages 13 and 14 of appellants' opening brief and according to Section 23 of the Bankruptcy Act, the jurisdiction to decide the issue is *exclusively* in the state Court and in a plenary suit. And you evidently in this matter have entirely overlooked the conclusive point made by appellants and the many authorities sustaining it, cited at page 9 of the opening brief, that the record shows on the face of it, *that the appellee has admitted that the boat is partnership property* and therefore it is not and cannot be subject to the jurisdiction of the District Court or its referee in the bankruptcy case, as distinctly held by the numerous authorities cited at page 10 of the brief. Such being the case before you, clearly your reasoning impliedly conceding to the Bankruptcy Court as it erroneously does, competent and legally sufficient jurisdiction to determine the question as to whether the boat is partnership property or not, is undoubtedly contrary to all the authorities on the point, and plainly erroneous in every possible aspect of the case presented by the record. Manifestly your ruling that the Bankruptcy Court and its referee have jurisdiction to determine the question, the boat never having been in the actual or constructive possession of either, as shown in both the opening and reply brief, and to do this by a *trial on the merits,* is certainly a ruling in conflict with well settled law, according to the numerous authorities cited at pages 13 and 14 of the opening brief.

V.

It is true there is no appeal from an order erroneously overruling an *objection* to the jurisdiction, but there certainly is an appeal from a denial by the District Court, of a petition to review and annul proceedings of a referee in bankruptcy, based upon such an order and subsequently culminating as plainly shown by the record here, in a void "turn-over" order, the referee had no jurisdiction to make, as against the real, substantial and *bona fide* adverse claim of title asserted by the appellants and held to be such by the authorities cited at pages 14 and 27 of the opening brief. In such a case and as decided by all the authorities upon the point, the jurisdiction to hear and determine the issue presented, as to whether the boat is partnership property or not, is *exclusively* in the state Court and in a plenary suit, the Bankruptcy Court never having had either actual or constructive possession of the boat. Your reasoning and your decision to the contrary, are clearly in conflict with this well settled law on the subject, as shown by the numerous authorities cited at pages, 11, 13, 14, 15, 16, 17 and 18 of the opening brief, for what you have actually done is to remit to the bankruptcy court and its referee, for decision, an issue over which neither can have jurisdiction, as held by all the authorities on the point. Dismissing the appeal without prejudice to the question is manifestly no answer to this objection. And in any event the ground on which you dismissed the appeal is not sustained by the record, a conclusive point already sufficiently discussed herein.

VI.

The record on the appeal, clearly shows that the referee made the "turn-over" order appearing therein at page 21 and referred to at pages 29 and 32, without allegation in the trustee's petition for the order, and without proof or decision that the adverse claim of title asserted by appellants is merely colorable and not real, substantial or *bona fide*. Now as held by the authorities cited at pages 14 and 27 of the opening brief, in this condition of the record, the law deems the adverse claim to be real, substantial and *bona fide* and not merely colorable, and therefore and as held by the many authorities cited at pages 13 and 14 of the brief, the Bankruptcy Court and its referee would have no jurisdiction to make the "turn-over" order appearing at page 21 of the record. It also clearly appears from the record that the "turn-over" order was made by the referee, for the sole purpose of bringing the boat in controversy into the jurisdiction of the Bankruptcy Court to have it there determined whether it is partnership property or not, the appellants being thus and thereby deprived of their legal and constitutional right to retain the possession of the boat until it is first decided by competent judicial authority, that the boat is not partnership property, but is the individual property of the bankrupt, or that their adverse claim of title is merely colorable. This procedure on the part of the referee in making the "turn-over" order for the purpose stated, is of course in violation of the "due process of law" clause in the Fifth Amendment as held by the authorities cited on the point in the opening and closing briefs

of the appellants. The referee also manifestly erred in holding as the record shows, that exclusive jurisdiction is in the Bankruptcy Court to determine on its merits the issue of title as to whether the boat is or is not partnership property, whereas according to all the authorities on the point, many of them cited in the opening brief, pages 13 and 14, the jurisdiction to determine the issue on its merits in the instant case, is *exclusively in the state Courts* as provided in section 23 of the Bankruptcy Act, and in a plenary suit, the Bankruptcy Court and its referee having only jurisdiction to determine whether the claim is merely colorable or not and then only if on allegation and proof, adjudged merely colorable, to make a "turn-over" order if and only if the Bankruptcy Court and its referee had either the actual or constructive possession of the boat in controversy at the time of the filing of the petition and the making of the adjudication in bankruptcy, a jurisdictional essential not existing in the instant case, as the boat was then in the valid *custodia legis* of the state Court under its writ of execution, as held by the Supreme Court in *Liberty Nat. Bank v. Bear,* 265 U. S. 365, 368 to 371 and *Taubel v. Fox,* 264 U. S. 426, 430 to 434, 437, 438. And the record before you is clear that prior to and at the time the "turn-over" order was made by the referee, the boat was then, ever since has been and now is in the valid *custodia legis* of the state Court in the there pending action of claim and delivery, now awaiting trial in due course, and in which pending action, the state Court is given *exclusive* jurisdiction by section 23 of the Bankruptcy Act, to determine the issue as to whether the boat is partnership property or

not, and its decision will be *res judicata* on the Bankruptcy Court and its referee, as held by the authorities cited on the point, at page 21 of the opening brief, a conclusive point in the case, also fully sustained by the many authorities cited at pages 13 and 14 of the opening brief. From all of which it results that the referee's "turn-over" order is absolutely void for want of jurisdiction. Now in dismissing the appeal you have thereby and in the reasoning on which you base your decision, and in impliedly at least, conceding to the Bankruptcy Court and its referee the authority to proceed to a hearing and trial of the adverse claim of title, on its merits, come into conflict with the well settled law that they have no such jurisdiction in the case, upon the facts presented by the record. For this reason also the petition for a rehearing should be granted.

VII.

In the event this petition for a rehearing is denied, we respectfully request a further stay of mandate for thirty days to enable us to file and docket within that period of time, the proper application to the Supreme Court of the United States for the writ of *certiorari,* concurrently with which we can also apply to the Court for leave to file a petition for mandamus compelling a hearing and decision of the appeal on its merits.

VIII.

For the reasons and upon the grounds stated in this petition for a rehearing, the appellants pray that it be granted and the appeal be determined on its merits, as required by law.

Dated, San Francisco,
July 19, 1929.

All of which is respectfully submitted.

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CERTIFICATE OF COUNSEL.

It is hereby certified that in our judgment and in the judgment of each of us, the foregoing petition for a rehearing is well founded and we do further hereby certify that it is not interposed for delay.

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